IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE UNITED STATES
TEMPORARY EMERGENCY COURT OF APPEALS

AMICUS CURIAE BRIEF FOR ASSEMBLY OF GOVERNMENTAL EMPLOYEES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Tenth Amendment of the Constitution of the United States bars the federal government from controlling the wages and salaries paid to employees of state governments.

STATUTES AND REGULATIONS INVOLVED

(1) Economic Stabilization Act of 1970 as amended, 84 Stat. 799, 12 U.S.C. §1904 (note), Pub.L.No. 91-379; 85 Stat. 1468, Pub.L. 91-588; 85 Stat. 13, Pub.L.No. 92-8.

(2) Ohio Revised Code §143.10(a), as amended by Amended Substitute Senate Bill 147 (1972).

(3) Regulations of the Pay Board of the Cost of Living Council, 6 C.F.R. §210.10.

STATEMENT

A. FACTS

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147. This legislation directed an average pay increase of 10.6 percent beginning January 1, 1972 for 65,000 employees of the State of Ohio, the State Universities and the County Welfare Departments. On March 6, 1972 and after appropriate administrative procedures, the Pay Board of the Cost of Living Council by resolution refused the Ohio application to pay the wage increases in full. Between February 10 and March 22, 1972, the cases of *Fry v. Ferguson* and *State ex rel. Boehm v. Legatt,* were filed in the Supreme Court of Ohio to seek a writ of mandamus requiring State officials to pay the wage and salary increases mandated by Bill 147. On June 20, 1973 the Supreme Court of Ohio consolidated these actions and issued the writ of mandamus.

The instant cause was instituted by the United States of America pursuant to Sections 209 and 211 of the Economic Stabilization Act of 1970, as amended (12 U.S.C. §1904) (hereinafter referred to as the "Act") in the United States District Court for the Southern District of Ohio. The United States sought a permanent injunction to prevent the State of Ohio from paying certain wage and salary increases to 76,000 state employees, state university personnel and County Welfare department employees in alleged violation of the Act, as amended (Pub.L. 91-379, 84 Stat. 799; Pub.L. 91-588, 85 Stat. 1468, Pub.L. 92-8, 85 Stat. 13; Pub.L. 92-15, 85 Stat. 38; Pub.L. 92-210, 85 Stat. 743), Executive Order 11695, 38 Fed. Reg. 1473 (1973), regulations issued by the Pay Board of the Cost of Living Council (6 C.F.R. §210.10), and the order of the Pay Board of March 10, 1973.

In the two separate Ohio State Court decisions, it was held that officials of the State of Ohio were required to pay the wage increases as provided in Senate Bill No. 147 passed by the Ohio General Assembly on January 15, 1972 and signed by the Governor on January 20, 1972, amending Ohio Revised Code · §143.10(A). *State ex. rel. Fry v. Ferguson,* 34 Ohio St. 2d 252, 298 N.E.2d 129 (1973); *State ex rel. Ervin v. Gilligan,* No. 72AP-47 (10th D.C.A., Franklin City, Ohio May 29, 1973). The legislative increases exceeded the increases authorized by the order of the Pay Board of March 6, 1973.

On the motion of the United States, the United States District Court for the Southern District of Ohio, on June 22, 1973, restrained the State of Ohio from implementing the wage and salary increases authorized by the court decisions. On June 12, 1973, the State of Ohio moved the District Court to join the individual plaintiffs in the state court actions as individual

defendants, which was granted on July 3, 1973. On June 29, 1973, an order was entered certifying the instant cause to the Temporary Emergency Court of Appeals in Washington, D.C. on the grounds that a substantial constitutional issue was presented.

On July 9, 1973 the Untied States moved the District Court for injunctive relief against the defendants pending final disposition from the Temporary Emergency Court of Appeals. Said motion was denied on the grounds that jurisdiction for such relief was in the Temporary Emergency Court of Appeals. On July 10, 1973 the United States moved the Temporary Emergency Court of Appeals for injunctive relief pending final disposition of certification which was granted.

On October 25, 1973, after briefs and oral argument on the merits, the Temporary Emergency Court of Appeals ordered a permanent injunction to restrain the State of Ohio and its officers from paying salary and wage increases to the extent that the increases exceed the amount authorized by the Pay Board. A copy of the opinion is appended to this brief.

A writ of certiorari was granted by this Court.

B. The Assembly of Governmental Employees.

The Assembly of Governmental Employees (AGE) was incorporated in the State of California in 1952 as a non-profit organization and its national headquarters is at 1224 17th Street, N.W., in the District of Columbia. AGE is a nationwide federation of state and local affiliates organizations comprising approximately 700,000 non-federal public employees encompassing forty-seven (47) affiliates in thirty-three (33) states and has a cooperative working relationship with an additional seven (7) state organizations. Several of the

petitioners joined in this action are members of the Ohio Civil Service Employees Association which is a member of AGE.

SUMMARY OF ARGUMENT

The principles of our federated form of government as recognized by the Constitution of the United States, acknowledged by the case law and embodied in the Tenth Amendment limit the authority of the commerce clause as exercised by Congress under the Economic Stabilization Act of 1970, as amended. Such limitation constitutionally prohibits Congressional interference with the indispensable sovereign duties of state government. Such interference becomes undue when the federal government can dictate the taxing, budget and proprietary prerogatives of state government thereby destroying reserved sovereign functions. Consequently, the Economic Stabilization Act of 1970, as amended, and the Executive Orders pursuant thereto, and the regulations promulgated thereunder concerning wage and salary levels cannot be applied where the basic sovereign functions of state government can, and are, eliminated.

ARGUMENT

The central issue before the Court is whether or not the constitutional principles of our federated form of government limit the power of the commerce clause as to not unduly interfere with the sovereign duties of state government. It is not suggested that the essential attribute of the commerce clause is less than plenary and exclusive. It is submitted, however, that such power cannot be imposed by the federal government in such a

manner as to virtually destroy the basic function of state sovereignty. It is *not* "too late in the day to question the power of Congress under the commerce clause to regulate" when such regulation negates the very substance of state sovereignty implied in the Constitution and case law. *California v. United States*, 320 U.S. 577, 586 (1944); *see also*, concurring opinion *Coan v. California*, No. SAC 7987 (Supreme Ct. of Cal., April 19, 1974). Legislatively establishing the levels of salaries and wages for employees from tax revenues of a state is clearly one of those "State activities . . . that partake of uniqueness from the point of view of intergovernmental relations" referred to by Justice Frankfurter. *New York v. United States*, 326 U.S. 572, 582 (1946).

The assertion taken by the federal government is that Congress possesses unlimited power under the commerce clause to regulate anyone – state, business entity, or individual – who is engaged in an activity which in some way affects interstate commerce. It is argued that state activities can be controlled if it is found that they, in any manner, affect commerce on the basis that the state purchases goods and services and that the state compensates their employees in the form of money which flows in the stream of commerce. Consequently, under the federal government reasoning, there is absolutely no limiting effect upon the Congressional exercise of power under the commerce clause.

Certainly, during this century, the Tenth Amendment has not shielded the states nor its subdivisions from the impact of the authority interpreted under the commerce clause. Although the question of sovereignty is *an* issue in these cases, they do not go to the question of the ability of a state to function.

In *United States v. California*, 297 U.S. 175 (1936), and *California v. Taylor*, 353 U.S. 553 (1957), the Court dealt with the regulation of state agencies that were engaged in the commercial activities by the operation of railroad lines. In *United States v. California*, the Court held that California as a state had the power to operate a railroad, but by engaging in such an enterprise, it subjected itself to the commerce power. *California v. Taylor, supra*, applied the same principle. The point of distinction, however, is that the state was engaged in a purely commercial activity, as carried on in the private sector. The activity was not integral to the operation of the state. *See also, Pardeen v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. United States*, 320 U.S. 577 (1944). The question of federal regulation substantially interfering with the essential sovereignty was not at issue. Rather if a state elected to enter into a commercial and *non-essential governmental activity*, federal standards can be applied. The basic function of the government was not at issue.

Similarly, *Case v. Bowles*, 327 U.S. 92 (1946), involved Congressional regulation of a non-essential business activity of a state: whether the sale of timber by the state although in accordance with state law but in violation of a federal ceiling price could be enjoined. The power of the state to sell timber was within its sovereign powers but the exercise or limitation of such power did not transgress its ability to function.

Other cases dealing with regulation of certain state activities under the commerce power are concerned with the foreign commerce power jurisdiction. In *Sanitary Dist. v. United States*, 266 U.S. 405 (1925) the Court sustained an injunction restraining the Chicago Sanitary District from diverting water from Lake Michigan for city use. The Court properly held

that the federal power of eminent domain exercised by Congress pursuant to the foreign commerce power was exclusive. *See also, City of Tacoma v. Taxpayers,* 357 U.S. 320 (1958); *Board of Trustees of Univ. of Ill. v. United States,* 289 U.S. 405 (1925). It is submitted, however, through the Economic Stabilization Act of 1970, as amended, the federal government has unrestrained control of the sovereign functions. Consequently, a clear abuse of power, unparallelled in the constitutional history of our country, has been invoked.

In *Maryland v. Wirtz,* 392 U.S. 183 (1968), the Court upheld the Congressional decision to require states to pay certain of their hospital and school employees minimum wage and overtime pursuant to the Fair Labor Standard Acts Amendments [29 U.S.C. §20119 (1964)]. Again, the Court took the position *"while the commerce power has limits, . . . ,"* it believed that a state institutions involved did affect commerce. 392 U.S. at p. 196-197. [Emphasis added.][1] It seems clear that in the *Wirtz* case the Court was dealing with activities that *could* be performed by private enterprise activities. Thus, the argument is that there is no differentiation between a public employee working in a hospital and a private employee working in a hospital.

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[1] The three-judge court in the *Wirtz* case divided precisely on the basic issues presented in the instant case. Judge Winter concluded that Congress had the power to regulate commerce beyond business activity interpreting the commerce clause as being plenary. Judge Thomsen, concurring, believed that there was a limit on the power of the federal government to regulate essential sovereign functions of a state, but it had not been reached. Judge Northrop, dissenting, also believed that there were limits to the commerce clause and by this case it had been reached.

It is respectfully submitted that, contrary to the position asserted by the government, the holding did not take the position that whenever the state spends money it is subject to regulation pursuant to the commerce clause. If this were the case, the Tenth Amendment would be rendered meaningless. The basic question here is whether or not the commerce clause application unduly interferes with the performance of the indispensable sovereign functions of a state.

It has been acknowledged that in relation to state sovereignty "[t]he power to tax involves the power to destroy." *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819). Although it is recognized that there has been a limitation placed upon the federal taxing power which has not yet been placed upon the commerce power, if the reasoning of the taxing power cases is valid, there is no reason why a limit on the commerce power should not be so construed by looking "to the structure of the Constitution as . . . [a] guide" when the identical destructive results are fostered upon state sovereignty. *New York v. United States,* 326 U.S. 572, 589 (1946).

> That immunity [of state instrumentalities from federal taxation] is implied *from the nature of our federal system and the relationship within it of state and national governments*, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow each government reasonable scope for its taxing powers . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within . . . Hence we look to the activities in which states have traditionally engaged as making the boundary of the restriction upon the federal

taxing power. *United States v. California*, 297 U.S. 175, 184-185 (1936). [Emphasis added.]

Since the limitation of the taxing power is related to the undue interference with the performance of a sovereign function of a state, the same limitation should be recognized in the commerce clause power. Thus, the real issue is not whether or not a state government does exert an influence upon interstate commerce, but whether a state government can determine basic functions of state government which cannot be transgressed by federal intervention because of the nature of our federal system and the relationship of state and national government. In short, can a state government determine the level of salaries for its employees which requires administrative and policy decisions designed to carry forth the very functions of government. If not, there is essentially no exclusive prerogatives of sovereignty left under the constitutional principles of federalism inherently recognized by our Constitution.

Certainly each factual pattern must be reviewed within its own scope and in the light of the degree of federal intrusion involved. However, if the concept of federalism is to be maintained in the face of the Tenth Amendment, there must be a defined constitutional limitation to the power of the federal government over interstate commerce as it relates to state sovereignty. It is submitted that the test, as in the taxing cases, should be the undue interference with indispensable functions of government. As former Chief Justice Stone has stated in discussing the taxing power, federal government may not "interfere unduly with the state's performance of its sovereign functions of government." *New York v. United States, supra* at 587. *See also, Graves*

v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931).

The basic problem recognized in the dissent by Justice Douglas in *Maryland v. Wirtz*, *supra*, has, by this case, been presented to the Court for determination:

> Could the Congress virtually draw up each state's budget to avoid "disruptive effect[s] . . . on commercial intercourse" [citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964)]. 392 U.S. at 205.

By limiting salary and wage increases from state revenues, the essence of Congressionally dictated state budget considerations has been achieved. Certainly, such an interpretation of the commerce clause is beyond the understanding of the ratifiers of the Constitution, the purposes of our federated form of government and the case law that has prevailed throughout our constitutional history on this issue. All case law seems to indicate that there is *some* limitation on the plenary power of the commerce clause – each case, however, has taken the position that it has not been reached. Even Daniel Webster, who successfully argued the landmark commerce clause case of *Gibbons v. Ogden* and maintained that "all the business and intercourse of life may be connected . . . with commercial regulations," readily conceded

> That the words used in the Constitution, 'to regulate commerce,' are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore, the words must have reasonable construction, and the powers should be considered as exclusively vested in Congress so far, and so far only, *as the nature of the power requires*. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 9-10, (1824) (arguments of counsel). [Emphasis added.]

It is conceded that the welfare and needs of a state are irrelevant to the constitutional application of the commerce clause power if Congress so deems. *See Sanitary District v. United States, supra.* It is submitted, however, that the use of the commerce clause power in the instant case goes beyond the welfare and needs of the state; it goes directly to the basis purpose of the commerce clause. Further, the purpose of the commerce clause is to protect rather than destroy. It is agreed that the Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular state or national power. *United States v. Spragg,* 282 U.S. 716 (1931). It did, however, confirm the belief that the federal government was one of specific powers and that certain powers were reserved to the states or the people eliminating the fear that the national government could directly interfere with the operation of state government.

> The preservation of the states and the maintenance of their governments are as much with the design and care of the Constitution as the preservation of the union and the maintenance of the national government. The Constitution, and all its provinces, looks to an indestructible union, composed of indestructible states. *Texas v. White,* 7 Wall. 700, 725 (1868).

If the position of the federal government were maintained, the commerce clause would not be used as a vehicle of protection, but could be used for the destruction of the very existence of a state as a separate entity. If a "constitutional differentiation still obtains" concerning a definition of commerce and commerce with foreign nations and among several states, there also must be constitutional differentiation between the

supremacy of the federal government under its delegated powers and the retained sovereign powers of the state specified in the Tenth Amendment. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1937). Legislatively determining the salary and wage increases of all state employees strikes at the very essence of such sovereignty.

Traditionally the salaries and wages of non-federal public employees are behind the private sector eighteen to twenty-four months due to a variety of circumstances including the scheduling of legislative sessions of governing bodies and the budget restraint vis-a-vis revenue. Since government is, however, in direct competition with the private sector for personnel, constant, even if delinquent, revision of public employees' salaries and wages is a continual and paramount budget responsibility of the state government. When increases are not provided for one year, they must be carried to the next legislative session and, as in the case of the instant cause, are intended to "catch up". By the Congressional implementation of the controls of the Economic Stabilization Act regulations such policy considerations are completely undermined. It is submitted that such policy considerations are a sovereign duty and function of a state and the basic structure of state government is unduly interfered with by the imposition of federal controls.

It is submitted that the limitations upon the power of Congress to regulate commerce is presented in the instant cause where the power so exercised unduly interferes with the state. The Economic Stabilization Act and the subsequent regulations as applied to the salaries and wages of the state employee must be constitutionally barred as reaching the limit of undue infringement upon the performance of an indispensable

and basic governmental function which is constitutionally recognized and protected. The question is basically that if Congress is prohibited from the destruction of sovereign government of a state by one avenue (i.e., tax), when is a point reached when that power is achieved through another avenue (i.e., commerce clause). The Supreme Court has had no difficulty in determining the level under the taxing cases cited above. It is submitted that the same destructive power has now been reached under the commerce clause.

CONCLUSION

It is respectively submitted that limits of Congressional power under the commerce clause of the United States Constitution have been reached in the instant cause. When the basic function of state government is precluded from operating by Congressional control, the federated form of our system of government no longer exists. This cannot be the intent of the Constitution.

Respectfully submitted,

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 6-2

United States of America,

Plaintiff-Appellant,

v.

The State of Ohio, et al.,

Defendants-Appellees.

Paul T. Michael, (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson, Stanley D. Rose, William C. White on the brief for Appellant), Department of Justice, Washington, D.C.

Robert B. Meany, Assistant Attorney General, (William J. Brown, Attorney General on the brief) for Appellee, State of Ohio.

John A. Brown, Lucas, Prendergast, Albright, Gibson, Brown & Newman, for Appellee, Successful Relators, Ernest Fry and Thelma Boehm in Supreme Court of Ohio.

Jerry L. Riseling for Appellee, Jesse T. Kaiser, Columbus, Ohio.

Stephen S. Boynton, McIntosh & Boynton, for Amicus Curiae, Assembly of Governmental Employees, Washington, D.C.

Leonard S. Sigall, for Successful Relators, James C. Ervin, et al., in the Tenth District Court of Appeals, Reynoldsburg, Ohio

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges.

VAN OOSTERHOUT, Judge.

This case has been certified to this court for appropriate proceedings in accordance with §211(c) of the Economic Stabilization Act as amended[1], hereinafter called the Act, by the United States District

Court for the Southern District of Ohio. The certification was filed in this court on July 3, 1973.

The issue certified is whether the Act "authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code. [Hereinafter called Pay Bill]."

This action was commenced in the United States District Court by the Government pursuant to §§209 and 211 of the Act. The Government seeks a permanent injunction to prevent the State of Ohio from violating the Act and Executive Order 11695 by paying wages and salaries provided by the Ohio Pay Bill to State employees in excess of the amount permitted by the Pay Board Order of March 10, 1973. The certification is based upon the trial court's determination that a substantial constitutional issue is presented.

Section 211(c) provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

The determination of whether appropriate action by this court should be limited to consideration of the

constitutional issue certified or whether all issues presented by the litigation should be resolved by this court must be made upon a case-to-case basis. Consideration must be given to the fact that this court is not well equipped to conduct an extensive evidentiary hearing in event such hearing is required, and the fact that the time of three judges living in scattered parts of the country would be consumed in conducting such hearing.

In our present case, all of the record before the trial court is before us. In addition all parties except James C. Ervin, et al., relators in State ex rel. Ervin v. Gilligan, et al., in the Court of Appeals for Franklin County, Ohio, have entered into and filed with us an agreed statement of facts. Ervin, et al., state in their brief that they agree with the statement of facts set forth in the briefs of the other appellees. Thus it appears that all matters of fact are before us and that no dispute exists as to the basic material facts. Under such circumstances, it is appropriate for us under §211(c) to hear and dispose of all issues presented by this litigation.

This court has granted plaintiff's motion for an injunction pending final disposition of this case.

The issues here presented may be summarized as follows:

(1). Did Congress intend to include the regulation of wages and salaries of State and local government employees within the coverage of the Act.

(2). Does Congress under the Commerce Clause of the Constitution have power to regulate State and local government salaries in light of State sovereignty and the Tenth Amendment.

(3). Did Congress have a rational basis for regulating the salaries of State employees.

For the reasons hereinafter set forth, we answer all of such questions in the affirmative and grant the Government the injunctive relief it seeks.

The appellees Ervin, et al., alone raise the issue that the judgment of the Franklin County, Ohio, Court of Appeals in State of Ohio ex rel. Ervin v. Gilligan, 35 Ohio App.2d 84 (1973), holds that Congress did not intend the Act to be applicable to the State employees, barring the Government from pursuing this action under the doctrine of res judicata. We reject such contention for the reasons hereinafter stated.

BACKGROUND FACTS.

The Pay Bill Act passed by the Ohio General Assembly became effective on January 20, 1972, upon being signed by the Governor. The bill provides for wage and salary increases for State employees by way of salary adjustments, reclassifications, and step increases amounting to an average increase of 10.6% for all employees affected by the bill. Approximately 65,000 employees of the State, the State University and the County Welfare Departments were granted the increase here involved, effective for the pay period beginning with the one that included January 1, 1972.

On February 10, 1972, the case of State of Ohio ex rel. Ervin v. Gilligan was filed in the Franklin County Court of Appeals seeking a writ of mandamus requiring Ohio officials to pay the salary increases provided for in the Pay Bill. Such relief was granted by a decision handed down on May 29, 1973, reported at 35 Ohio App.2d 84.

The State of Ohio filed an application with the Pay Board for permission to pay salary increases provided in the Pay Bill. An evidentiary hearing was afforded. The

Pay Board by decision and order of March 10, 1972, denied the State's application for exception to the extent the requested increase was in excess of 7% for the current year. The State filed a petition for reconsideration which was denied. Additional requests for authority to pay the remaining amount of the salary increases provided by the Pay Bill and for reconsideration were denied.

On June 20, 1973, the Supreme Court of Ohio in the consolidated cases of Fry v. Ferguson, State ex rel. Boehm v. Legatt, and State ex rel. Kaiser v. Ferguson, 35 Ohio St.2d 252, determined that the state officials must pay the entire salary increases provided by the Pay Bill. The Government was not a party to that action. The decision is based on the court's determination that Congress had not authorized the regulation of State salaries and wages.

It is agreed that the salary increases involved in this litigation are those for work performed between the pay period that included January 1, 1972, and March 1972, and that pursuant to Pay Board Order of March 10, 1972, State employees had been receiving the total salary increases provided by the Pay Bill since March of 1972.[2] Approximately $10.2 million is involved in the salary increases here involved and funds have been appropriated and encumbered pending payment. In addition, approximately five million dollars in wage and salary increases which have not been paid to State University and County Welfare Department employees is involved.

STATUTORY CONSTRUCTION ISSUE.

The State urges that Congress did not by the Economic Stabilization Act intend to authorize control over State wage and salary practices. Reliance is placed

on the decision of the Ohio Surpeme Court in *State v. Ferguson, supra.* In that case, the Ohio court held that a federal administrative body lacks jurisdiction to prevent enforcement of a State statute establishing the rate of compensation of State employees in the absence of a specific statutory grant of such power. The State relies on Parker v. Brown, 317 U.S. 341 (1943), and California v. Zook, 336 U.S. 725, 733 (1949), to support its contention. Reliance on such cases is misplaced. They did not go to the extent of holding that preemption of a field constitutionally authorized can be accomplished only by an express statement that the law applies to states. It is quite true, as stated in the cases relied upon, that preemption is not to be lightly inferred. Morever, *California v. Zook* makes mention of lack of supporting legislative history.

The contention here urged by Ohio was rejected in Case v. Bowles, 327 U.S. 92, 99 (1946), the Court holding:

> The argument that the Act should not be construed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state," courts should not construe regulatory enactments as applicable to States. This Court has previously rejected similar arguments, and we cannot accept such an argument now.

In United States v. California, 297 U.S. 175, 186 (1936), the Court holds:

> Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see Guarantee Title & Trust Co. v. Title Guaranty Co., 224 U.S. 152; United States v. Herron, 20 Wall. 251; In re Fowble, 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. United States v. Herron, supra, 255; Dollar Savings Bank v. United States, 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicity state. . . .

In Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-48 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972), the Eighth Circuit held that the federal government had preempted the field of regulating leaks of radioactive effluents of nuclear power plants. No express statement of preemption was contained in the legislation. The court held that federal preemption could be implied and listed the key factors bearing on the intention of Congress to preempt as follows:

> . . . even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied. . . . Key factors in the determination of whether Congress has, by implication, preempted a particular area so as to preclude state attempts at dual regulation include, *inter alia:* (1) the aim and intent of Congress as revealed by the statute itself and its legislative history. . . . (2) the pervasiveness of the federal

> regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency... (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests." ... (4) "whether under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations omitted) Id. at 1146-47.

It is quite true that the Economic Stabilization Act does not in express language state that it applies to the States. On the other hand, there is nothing in the statute which indicates that its provisions shall not apply to the States. The extensive legislative history of the Act unequivocally reveals that Congress intended the Act and its salary and wage provisions to apply to State and local governments. The most significant evidence of such intent is that Senator Proxmire on the floor of the Senate offered an amendment to exempt the salaries of State and local government employees from the operation of the Act. Such amendment was debated and defeated by a vote of 56 to 35.[3]

The discussion of the bill in the Senate and House committees considering the bill reflects that the committees considered it necessary to cover State employees' salaries by the Act and that it was their clear intention to do so.[4]

The stabilization agencies have uniformly interpreted the Act to include States within its scope. The interpretation of statutes by the administrative agency responsible for their implementation is entitled to great weight. University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1068 (Em.App. 1972). It is clear from the Act and its legislative history that

Congress intended the Act to apply to wages and salaries paid State and local government officials and employees. Compliance with both the State law increasing salaries and wages and the Stabilization Act is impossible. Thus, if the government has constitutional power to regulate the areas here involved, the federal Act controls under the doctrine of preemption.

CONSTITUTIONAL ISSUES.

The power of Congress to impose economic controls over compensation paid State and local government employees is based upon the Commerce Clause. In Murphy v. O'Brien, No. 1-2, ____F.2d ____(Em.App. Oct. 10, 1973), this court was confronted with the contention that State sovereignty and the rights reserved to the States by the Tenth Amendment precludes Congress in the exercise of its power under the Commerce Clause from authorizing under the Economic Stabilization Act the power to regulate charges for services made by the State of Rhode Island. In that case, the State statute imposed vehicle parking charges on State owned beaches where no such charge had been made prior to the price freeze period. We there held:

> Otherwise valid federal legislation, *e.g.*, the Economic Stabilization Act, which incidentally interferes with state affairs has in recent times been uniformly upheld by the Supreme Court. Maryland v. Wirtz, 392 U.S. 183(1968); Case v. Bowles, 327 U.S. 92 (1946); New York v. United States, 326 U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936). . . .

Judge Hastings, speaking for this court, clearly sets out the reasoning and the authority upon which our

decision is based. What is said in that case equally applies to our present case.

Whatever doubt may have existed with respect to the power of Congress under the Commerce Clause to regulate State activities under appropriate circumstances is resolved by Maryland v. Wirtz, 392 U.S. 183 (1968). In that case, the Fair Labor Standards Act as amended was applied to the States and the States were required to conform to the minimum wage standards and overtime provisions of the Act with respect to employees of the hospitals and schools operated by the State. The Court, after determining the operations of the hospitals and the schools affect commerce, holds:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States v. California,* 297 U.S. 175. . . . 392 U.S. at 196-197.

The Court quotes from United States v. California the following:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 183-185 (citations omitted). *Id.* at 198.

and then goes on to hold:

> The principle of *United States v. California* is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens. *Id.*

The State argues that if employees' salaries and wages can be controlled, then all State activities can be controlled. A similar contention was answered and rejected in Maryland v. Wirtz as follows:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. . . . 392 U.S. at 193.

The Government concedes in its brief that the Commerce Clause does not give Congress the power to regulate all State activities but that such power exists when Congress has a rational basis to conclude that the regulated State activities substantially affect commerce. As stated in New York v. United States, 326 U.S. 572, 583 (1946):

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . .

The impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of the Act under consideration. The wage increases involved in Wirtz remain in effect indefinitely and until the law is repealed or appropriately amended. Compliance requires the State to raise additional money to make the payments. In our present case, the wage increases are temporary. The State is placed in the same position as private employers with whom the State competes for qualified employees. State expenditures are decreased rather than increased and thus no additional revenue need be raised.

Provision is made in §207 of the Act and the regulations promulgated under the Act for exceptions or exemptions in case or hardship. Such administrative consideration has been afforded the State in the present situation and partial relief has been afforded to the extent of authorizing a 7% wage increase. The Act at §202 makes the finding that it is necessary in order to stabilize the economy, reduce inflation and to protect the purchasing power of the dollar to stabilize prices, rents, wages, salaries, dividends and interest. Similar findings are made in the Presidential proclamation implementing the Act.

We find here, as we did in Murphy v. O'Brien, supra, that a rational basis exists for imposing temporary economic controls on salaries paid by State and local

governments. The State has not shown that the wage controls imposed unreasonable interference with the ability of the State of Ohio to function as a sovereign state, or that the Act and the regulations are invidiously discriminatory.

RES JUDICATA ISSUE.

As heretofore noted, the res judicata issue is raised only by the appellees Ervin, et al., who were the successful parties in the Ohio Court of Appeals for Franklin County. The res judicata defense is based upon the Government being a party to the Ohio Court of Appeals case by reason of the Court having permitted the Government to intervene. The Court's reported opinion reflects that the case was continued pending resort to administrative proceedings and that at a conference between the parties and the Court on April 6, 1973, the Court asked the parties to brief certain issues, including the following:

1. Does the Tenth Amendment preclude the Government from regulating the salaries of officers and employees of State government.

2. Is there any improper delegation of authority in Executive Order No. 11695.

The Government on April 19, 1973, filed a petition for removal to the federal court and by reason thereof took no steps to brief the issues requested by the State Court. Twenty-eight U.S.C. § 1446(e) provides that after removal "the state court shall proceed no further unless and until the case is remanded." Such language is clear and unambiguous. The federal court remanded the case on June 13, 1973, on the ground that the removal was not timely, noting however that the state court's judgment rendered May 29, 1973, prior to removal, was improper under § 1446(e). The Government was

afforded no opportunity to present its position to the State Court of Appeals.

Moreover, § 211 of the Act manifests a clear intent to give federal courts exclusive jurisdiction over the constitutionality of the Act and the validity of any action taken by any agency under the Act. The national scope of the Act, its underlying policy and the doctrine of federal preemption, should negate giving any res judicata effect to the State court judgment insofar as it relates to federal government and its authorized agencies. *See* Kalb v. Feuerstein, 308 U.S. 432, 438-439 (1940); Restatement of Judgments § 71 (1942). We reject the res judiciata defense.

SUMMARY.

We hold that the Act, supported by its legislative history, clearly shows that Congress intended the Act to apply to states; that Congress under the Commerce Clause acted constitutionally in regulating the State salaries and wages; that the application of wage and salary restrictions to the states was reasonable and necessary to accomplish the objectives of the Act; that State sovereignty was not unduly nor unnecessarily interfered with; that the res judicata defense raised by Ervin, et al., is without merit. The Government is entitled to the injunction for which it prays.

It is ordered that an injunction issue restraining the State of Ohio and its officers from paying salary and wage increases provided for in the Pay Bill to the extent that they exceed the amount authorized by the Pay Board.

FOOTNOTES.

[1]P.L. 91-379, August 15, 1970, as amended by P.L. 93-28, April 30, 1973, and P.L. 92-210, December 22, 1971.

[2]The Pay Board in its March 10, 1972, order at paragraph 7 states: "The payment of the wage and salary increase submitted to the Board for approval would, if paid on and after March 17, 1972, result in the same aggregate payments as a 7 percent increase paid for the full wage year."

In its order, the Board holds: "[I]t is ordered that the application for an exception is denied to the extent that the requested wage and salary increase is in excess of seven percent (7%) for the current wage year computed pursuant to the policies and regulations of the Pay Board. . . . The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is placed in effect no earlier than March 17, 1972."

[3]117 Congressional Record 43,673, 43,677.

[4]To set out the pertinent legislative history, much of which is set out in the Government's brief and appendix, would unduly extend this opinion. We note that the Senate committee specifically stated in its report on the Bill that it had rejected a number of proposed exemptions, including pay adjustments which apply to employees of State and local governments. Senate Report No. 92-507; 2 U.S. Code Cong. Ad. News 2286, 92d Cong., 1st Sess. 1971.

In the House hearing, Secretary Connally, then chairman of the Cost of Living Council, in response to an inquiry by Representative Gonzalez as to whether State and local government employees were exempted, replied:

> With respect to State and local governments, let me simply say that I don't think there is any question but that where Congress enacts legislation of this type it certainly is applicable to State and local governments. And it seems to me you can't equitably impose a wage-price freeze, which we are in the midst of now, on the American economy and exempt State and local employees simply because State government, local governments have increased enormously both in terms of numbers of people and in terms of dollars.

Hearings on H.R. 11309, 92d Cong., 1st Sess., parts 1 & 2, page 342.